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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL J. HALLIWELL,
Appellant,

v.

MARCH FONG EU, SECRETARY OF STATE
OF THE STATE OF CALIFORNIA,
Appellee,

and

THE SENATE AND ASSEMBLY
OF ~~THE~~ STATE OF CALIFORNIA,
Appellee-Intervenors

On Jurisdictional Transfer from the
Ninth Circuit Court of Appeals
Under 28 U.S.C. § 1631

Jurisdictional Statement

In Propria Persona

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QUESTIONS PRESENTED

Questions Involving District Court Consideration

1. Is a state supreme court's exercise of equitable discretion in selection of statewide redistricting plans vulnerable to attack on due process grounds if the factual basis of the grounds given for the selection is shown to be so lacking in evidentiary support as to suggest that the selection was in fact politically motivated? May such a claim be dismissed at the pleading stage before a litigant is allowed to present proof of premises noted above? See pp. 8-10 infra.

2. Does the Fourteenth Amendment protect state constitutional rights from politically motivated discriminatory application by a state supreme court? Are all state law aspects of a federal

claim outside the jurisdiction of a federal court? See pp. 10-11 infra.

3. Are ethnic gerrymandering claims subject to the usual rules governing jus tertii, or must one be a member of the group subject to ethnic gerrymandering in order to have standing to pursue such a claim? See p. 11 infra.

4. Is partisan gerrymandering which minimizes the voting power of one's political group cognizable only if the means of discrimination is population disparities among districts? See pp. 4-5, 21-26 infra.

5. Does First Amendment protection of the right to effective political association extend, in states with constitutions which include the right to petition via the initiative and referendum, to protection of a right to petition effectively for redress of grievances? Are fealty to a written

constitution and effective popular sovereignty essential elements of a republican form of government within the meaning of the Guaranty Clause of Article IV § 4 of the United States Constitution? See pp. 4, 17-21 infra.

6. May a single district judge who is presented with a substantial constitutional challenge to a statewide redistricting plan impose his own restrictions on a plaintiff's claims as a condition of convening a three-judge court pursuant to 28 U.S.C. § 2284? See pp. 7-8, infra.

7. Is it a violation of the Equal Protection Clause of the Fourteenth Amendment to give some legislative districts double representation while depriving others of any representation by causing districts with a carryover incumbent to elect an additional state senator while other districts are

allowed no opportunity to replace a senator whose term expires? See pp. 27-31 infra.

8. Where modifications of districts by a chief elections officer are not authorized by any legislation or judicial decision and where the modifications are demonstrably made with the purpose of deflecting a constitutional challenge to the districts as they are defined in law, does the principle that unregulated discretion vested in a single individual is outside the domain of law render the districts thus revised unconstitutional? See pp. 32-33 infra.

9. May a court grant a summary judgment without a hearing in a statewide redistricting case when essential data needed to oppose the summary judgment is being withheld by the architects of the challenged districts and then

refuse to rule on a motion for reconsideration pointing out allegedly significant facts which the court has overlooked? See pp. 33-38 infra.

10. If a litigant seeks injunctive relief immediately after a redistricting plan is adopted, may a court delay adjudication until the districts have been replaced, refuse to consider evidence that the new districts perpetuate the constitutional flaws of the original districts, and declare the claim moot without violating the "capable of repetition yet evading review" doctrine? See pp. 38-46 infra.

11. If the state's chief elections officer challenges the malapportionment of a statewide legislative districting plan before the state supreme court and loses, may she decline to defend this plan against a federal constitu-

tional challenge and thereby preclude the adjudication of such a claim? See pp. 47-50 infra.

12. If a state supreme court applies a state constitutional provision requiring decennial reapportionment to justify adopting its own redistricting plans for legislative bodies with eight-year-old districts but refuses to require new districts for a legislative body with ten-year-old districts, may that state court be required to defend its action in a federal lawsuit? See pp. 50-52 infra.

13. May a court adjudicating challenges to allegedly malapportioned districts dismiss a challenge to such districts without allowing any discovery when essential data on the contested districts has been withheld by the designers of the challenged districts? See pp. 52-55 infra.

14. May a court which has failed to adjudicate a redistricting lawsuit in spite of a plaintiff's sustained effort to prosecute same until the challenged districts have been replaced by allegedly similar districts refuse leave to amend to challenge the new redistricting plans? See pp. 55-57 infra.

15. May a court issue a sua sponte termination of a redistricting lawsuit without ruling on all of the motions before the court and then deny reconsideration of this termination without briefing and subsequently refuse to issue any orders at all regarding matters left unresolved at the time the action was terminated? See pp. 57-59 infra.

Questions Involving Circuit Court Consideration

A. Does a district court's delaying for

two to three-and-a-half years in ruling on motions for injunctive relief in a statewide redistricting case violate the expedited consideration requirement embodied in 28 U.S. C. § 2284 and its legislative history? In these circumstances, does a court of appeals have jurisdiction over an appeal which seeks to force a three-judge district court to expedite its consideration? See pp. 1, 5-7 infra.

B. When a district court has referred discovery proceedings to a magistrate and then rules sua sponte that the action is terminated in its entirety, may a litigant seek to force completion of discovery proceedings by means of a writ of mandamus before proceeding with a substantive appeal? May a circuit court delay ruling on a petition for mandamus for 12 months? See pp. 1-2, 60 infra.

C. When a circuit court transfers an appeal to the mandatory docket of the United States Supreme Court pursuant to 28 U.C.S. § 1631, must that court, in response to a motion for clarification, address the jurisdictional considerations set forth in Supreme Court Rule 15.1(e)? See pp. 2, 60-62 infra.

D. May a circuit court panel of judges whose decision is challenged by a petition to the court of appeals en banc prevent such a petition from being forwarded to the active service judges of that circuit? See p. 62 infra.

Questions Involving Supreme Court Consideration

I. Will the United States Supreme Court bypass the court of appeals and issue a writ of mandamus directly to a three-judge district court without

requiring that a litigant first seek issuance of the writ by his circuit court? See p. 3 infra.

II. In a redistricting case where the district court and the court of appeals have refused to issue opinions explaining their actions and refusals to act and where none of plaintiff's claims have been adjudicated in a timely fashion, during which period three complete election cycles have passed, will the Supreme Court appoint a special master to investigate charges of systematic obstruction of justice? See pp. 63-65 infra.

III. Will systematic obstruction of justice, if proven in such a case, be deemed to constitute a breach of the good behavior requirement which limits the tenure of federal judges under Article III § 1 of the United States Constitution? See pp. 63-65.

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UNITED STATES CONSTITUTION:

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CALIFORNIA CONSTITUTION:

Article I § 3, Article I § 7(a), Article II § 1, Article II § 8, Article II § 9, Article II § 10, Article IV § 1, Article IV § 3(b), Article IV § 6, Article IV § 8(b), and Article XXI.

UNITED STATES CODES:

28 U.S.C. § 1253, § 1631, § 1651, § 2284, and 42 U.S.C. § 1983.

CALIFORNIA ELECTIONS CODE § 55, § 30000, and § 30012 (1981) and California Government Code § 12172.5.

I. JURISDICTION

Halliwell v. Eu is a constitutional challenge to four statewide redistricting plans before a three-judge district court convened pursuant to 28 U.S.C. § 2284. During the first 3½ years of litigation the District Court delayed ruling on all injunctive proposals until they became unfeasible, or refused to rule at all. During this time Plaintiff twice petitioned the Ninth Circuit to expedite proceedings (C.A. 82-4453 and C.A. 84-1859), but the Ninth Circuit refused jurisdiction over these attempted appeals. On July 9, 1985 discovery proceedings before a magistrate were terminated by a sua sponte dismissal of the action in its entirety by the District Court. On July 17, 1985 Plaintiff filed a motion for reconsideration which was denied on August 5, 1985.

On August 31, 1985 Plaintiff invoked

F.R.A.P. § 21, but the Ninth Circuit refused to take cognizance of Plaintiff's petition for mandamus, ruling on August 19, 1986, "The Supreme Court has exclusive jurisdiction over this appeal." (16 Record 239.*) On August 26, 1985 Plaintiff sought reconsideration of this jurisdictional transfer pursuant to 28 U.S.C. § 1631. On November 5, 1986 the Ninth Circuit denied reconsideration without explanation (16 Record 239), so Plaintiff sought a stay of jurisdictional transfer pending clarification. On February 26, 1987 clarification was denied and jurisdiction was transferred forthwith (17 Record 157-158). On March 27, 1987 Plaintiff filed Notice of Appeal from the order of February 26, 1987 in the Ninth Circuit Court of Appeals and

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*Volume and page number citations such as this are references to the record below and are included to facilitate response by appellees.

in the District Court. (See 17 Record 240-326.)

Plaintiff believes that the denial of jurisdiction by the Ninth Circuit is erroneous but that pursuing a jurisdictional appeal at this point probably would further delay a decision on the merits. Moreover, Supreme Court Rule 17 notes that a writ of certiorari is a matter of judicial discretion, whereas a purported transfer to the mandatory docket of the Supreme Court is a matter which the High Court must review. Furthermore, it does not follow that the U.S. Supreme Court lacks jurisdiction simply because the Circuit Court of Appeals should have exercised its own mandamus jurisdiction. See Los Angeles Brush Corp. v. James, District Judge (1927) 272 U.S. 701, 707.

II. CONSTITUTIONAL PROVISIONS AND STATUTES

Please see pp. 363-385 of Appendix B.

III. STATEMENT OF THE CASE

A. Opening Phase of the Litigation

Halliwell v. Eu (Civ.S. 82-147-LKK) is a redistricting action filed in the Eastern District of California Federal District Court challenging the constitutionality of California's Congressional, Senate, Assembly, and Board of Equalization districts. Plaintiff's February 19, 1982 opening complaint alleged that the contested districts were mandated by the California Supreme Court in violation of the Due Process Clause of the Fourteenth Amendment, that the court-ordered districts violated Article XXI of the California Constitution, that the abrogation of referendum stay provisions violated the Guaranty of a Republican form of government in Article IV § 4 of the U.S. Constitution, and that the districts manifest partisan, ethnic and geographic discrimination in violation of the Equal Protection

Clause of the Fourteenth Amendment.

On March 15, 1982 Plaintiff filed a motion asking the Court to "establish a specific calendar for consideration of legal arguments and remedial proposals and to promptly require a responsive pleading from Defendant." Plaintiff later contacted Judge Karlton's law clerk to find out why no action had been taken on this motion and was told that, according to Judge Karlton, "You can't just invent motions."

On April 1, 1982 Plaintiff filed a motion for a temporary restraining order to preserve the viability of his proposed remedies until he could secure a ruling on the merits of his claims. At the April 14, 1982 hearing on Plaintiff's TRO proposal to require whole-precinct swaps to ameliorate constitutional defects before the elections could proceed, Judge Karlton refused to allow Plaintiff

to demonstrate the feasibility of his proposal on the ground that "federal courts have no authority to tell local officials how to conduct elections." (2 Record 289.) Two weeks later Judge Karlton issued the following order: "This matter having come on for hearing on April 14, 1982, and the Court having been fully advised, the motion of Plaintiff for Temporary Restraining Order is denied."

On April 19, 1982 Plaintiff filed a protest (2 Record 304-317) against the delaying tactics of Defendant and the Court's refusal to establish procedures for compiling a record necessary for an adjudication on the merits. Plaintiff requested a status conference, and the Court scheduled one on May 3, 1982.

Plaintiff warned that under Herron v. Koch (1981) 523 F.Supp. 167, 174 the stalling tactics of the Secretary of

State might make it necessary to postpone the June 8 primary election. But Judge Karlton stated in his order following status conference,

> "It now appears that the Plaintiff may still obtain a legally efficacious remedy should he prevail on the merits of this action after this court disposes of the [Defendants' third and fourth dismissal] motions brought on pursuant to this order [and to be heard on June 11]. Resolution of all other matters is therefore deferred pending the court's disposition of the aforementioned motions." (3 record 43.)

B. Judge Karlton's Dismissal of Most of Plaintiff's Claims

On June 30, 1982 Judge Karlton signed an order (filed on July 1) which denied Defendants' dismissal motions. However, Judge Karlton did not confine himself to ruling on the motions which had been briefed and argued. The order of July 1 explains,

> "These motions do not fatally pierce the Plaintiff's lawsuit. They are, however, a useful tool with which to hack away the necrotic claims and

> attached allegations, arguments, innuendo, and creative legal theories which form the bulk of this massive, sprawling complaint. In this manner I hope to reveal whether there is any living tissue consisting of cognizable constitutional claims buried within this great flaccid carcass." (4 Record 42-43.)
>
> "As I have indicated, Mr. Halliwell makes a number of claims and advances a plethora of legal theories that relate marginally or not at all to any legally cognizable injury that he has suffered. In order to chart a course through the rhetorical morass created by the Plaintiff, I shall attempt to fix my compass on the specific legal harms that Mr. Halliwell claims to have suffered. As I shall demonstrate, this approach inevitably eliminates the great majority of Plaintiff's claims and theories." (4 Record 44-45.)

28 U.S. § 2284(b)(3) states, "A single judge shall not . . . enter judgment on the merits." But Judge Karlton in the order of July 1 rendered what amounted to adverse summary judgments on most of Plaintiff's claims.

1. Due Process Claim Excluded

Judge Karlton continues,

"One of the central claims asserted by the Plaintiff is that the California Supreme Court conducted its proceedings in such a prejudicial fashion that he was effectually denied due process of law in violation of the fourteenth amendment to the United States Constitution. In this regard, the Plaintiff alleges that the California Court refused to consider evidence relevant to the legality and efficacy of the plans that it adopted and similarly refused to consider alternative plans tendered by the Republican National Committee [and others]." (4 Record 45.)

Judge Karlton comments,

"[E]ven if California is depriving the Plaintiff of an interest protected by the fourteenth amendment, that fact would only provide the beginning, rather than the end of the requisite analysis. 'Nothing in [the Fourteenth] Amendment protects against all deprivations of life, liberty or property by the State. The Fourteenth Amendment protects only against deprivations "without due process of law."' Parratt v. Taylor, 451 U.S. 527 (1981). It could hardly be said that Mr. Halliwell was denied due process by the State of California, for he never sought to invoke the processes of the state except in his attempts to influence the California Supreme Court from his perch as amicus curiae in Assembly v. Deukmejian. As I have explained, a person acting as a friend of the

> court is not a party, and is not entitled to any particular procedural protections. In short, even if we assume that the California Court's interpretation of California law worked to deprive the Plaintiff of some cognizable interest, 'the question remains what process [was] due.' Morrissey v. Brewer, 408 U. S. 471, 481 (1972). The answer in this case is: none." (Footnote 6 at 4 Record 60.)

2. State Law Claims Excluded

The order of July 1 also observes, "Mr. Halliwell emphatically asserts that the California Supreme Court's decision effectively deprives him of rights guaranteed by California state law."* (4

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*Plaintiff describes his principal state law claim as follows:

> "In seeking to justify the abrogation of referendum stay provisions the majority opinion in Assembly v. Deukmejian (1982) 30 Cal.3d 638 argued:
>
> > 'When the delay caused by such state constitutional prescriptions conflicts with a citizen's federal constitutional right to cast an equally weighted vote, a court has the power to set aside the state constitutional provision.' Id. at 659.
>
> "The Court decided to do so

Record 46.) The order of July 1 adds,

> "Mr. Halliwell [argues]:. . . that the California Court's allegedly erroneous interpretation of federal law was really just a subterfuge by which the state court sought to avoid compliance with its own constitution. Put bluntly: whether the decision in Assembly v. Deukmejian accords with California law is not and cannot be a matter of concern to this court." (Footnote 5 at 4 Record 59.)

The order of July 1, 1982 also notes,

> "[A]s I have explained, rights under state law exist only to the extent that the state supreme court recognizes their existence; this court cannot create rights in the plaintiff based on state law beyond those recognized by the final arbiter of state law." (Footnote 6 at 4 Record 60.)

Therefore Judge Karlton concludes,

> "Thus to the extent that the complaint is based on alleged violations of the Plaintiff's rights under California law, it must be dismissed without leave to amend for this court lacks jurisdiction over the subject matter of those claims. (4 Record 47.)

> because 'circumstances require the immediate effectuation of the federal constitutional right.' Id." (18 Record 160-161.)

3. Ethnic Gerrymandering Claims Excluded

Judge Karlton's order of July 1, 1982 explains his rationale for eliminating Plaintiff's claims involving systematic dilution of the voting power of black and Hispanic minorities as follows:

> "As Mr. Halliwell conceded at oral argument, however, he is not a member of any such ethnic or racial group. Once again, whatever the merits of his claim of unlawful political discrimination against persons of color, the Plaintiff simply lacks standing to press that claim. Laird v. Tatum [408 U.S. 1 (1972)]." (4 Record 47.)

4. Partisan Gerrymandering Claims Circumscribed

Judge Karlton sharply limits Plaintiff's partisan gerrymandering claim, saying, "[T]he partisan drawing of districts in a manner designed to maximize the electoral strength of the majority party does not in itself give rise to a

claim cognizable in this court." (4 Record 47-48.) Judge Karlton explains,

> "I do not mean to suggest that the alleged distortion of election districts to serve political ends is irrelevant to the question of whether deviations from absolute population equality are justifiable under the standards [for congressional and state legislative districts]." (4 Record 49.)

5. Denial of Jurisdiction over Guaranty Clause Claims

The order of July 1 states:

> "In an attempt to make this mass of undigestible claims palatable, the Plaintiff mixes them into a stew and serves it up as a claim based on the Guaranty Clause." (4 Record 50.)

Judge Karlton rules,

> "This court lacks jurisdiction over the subject matter of Guaranty Clause claims; any such claims that do not have an independent and cognizable basis are hereby dismissed without leave to amend." (4 Record 51.)

6. Claims Ruled Cognizable

The order of July 1 concludes,

> "The motions to dismiss the complaint for failure to state a

> claim upon which relief may be granted, and for lack of subject matter jurisdiction are denied. The Plaintiff's amended complaint is dismissed, however, so that he may draft new pleadings consistent with this order. . . . That pleading shall be denominated 'Second Amended Complaint,' and shall set forth a short and plain statement of those claims which are cognizable in this court -- i.e., the claims based on the alleged violation of the Plaintiff's voting rights protected by the 'one person, one vote' guarantees of the United States Constitution. The new complaint shall also contain a concise statement of the relief which the Plaintiff seeks; the details of Plaintiff's proposals should not be included. Finally, the Plaintiff is directed not to assert any claims that have been discussed in this order and dismissed without leave to amend." (4 Record 57-58.)

7. Plaintiff's Motion for Reconsideration

In the Introduction to Plaintiff's July 12, 1982 motion for reconsideration of Judge Karlton's sua sponte dismissals without leave to amend Plaintiff argues,

> "It is a matter of record that none of the 33 cases cited by the Court in sections IIIA-IIID of the June order were included in any of

> the defendants' briefs. Since the Court relied on its own research in ruling on the motions to dismiss, the Plaintiff has had no opportunity to relate his claims to these cases cited as governing precedents by the Court." (4 Record 77.)

Plaintiff's motion concludes,

> "Plaintiff submits that the preceding analysis demonstrates sufficient merit in his various excluded claims so that he ought to be allowed to present them in a supplemental amended complaint." (4 Record 93.)

The three-judge panel appointed pursuant to the July 1 order ignored this reconsideration motion for the next six months. Plaintiff therefore submitted a revised reconsideration request divided into six separate motions in order to require at least a yes-or-no response to claims the full Court had refused to address. Plaintiff's motions challenged the order of June 30, 1982 on procedural grounds (7 Record 59-67) and sought to reinstate his state constitutional claims (7 Record 68-86), his Due

Process of law claims (7 Record 87-98), his ethnic gerrymandering claims (7 Record 99-105), his partisan gerrymandering claims (7 Record 106-109) and his Guaranty Clause claims (7 Record 110-112.)

The full Court then decided to take cognizance of Plaintiff's original reconsideration motion, which had never been briefed; on April 19, 1983 the full Court issued the following blanket affirmation of Judge Karlton's exclusions:

> "The Plaintiff requests the full panel to reconsider Judge Karlton's July 1, 1982, order. Such a motion is clearly contemplated by 28 U.S.C. § 2284(b)(3), and is thus granted. Upon reconsideration, the Court determines to reaffirm Judge Karlton's holdings, essentially for the reasons stated in the July 1 order." (8 Record 120).

Neither in this order nor at any other point in the 3½ years of the "trial" phase of Halliwell v. Eu does Judge Kennedy or Judge Ramirez say any-

thing at all about Judge Karlton's flat exclusion of the Due Process, state law, or ethnic gerrymandering aspects of the case. Although Plaintiff's partisan gerrymandering and Guaranty Clause claims ostensibly were only circumscribed by the order of July 1, 1982, the Court resolutely ignored even those aspects of these claims that were within the limitations imposed by Judge Karlton.

8. Subsequent Consideration of Guaranty Clause Aspects of Plaintiff's Claims

Plaintiff's outline of his claims states (in Item VI at 3 Record 387, 399) that federal constitutional protection of the referendum has an independent basis in the right to effective political association secured by the First Amendment (see Williams v. Rhodes (1968) 393 U.S. 23, 30-31) as well as in the effective popular sovereignty (recognized

since Chisholm v. Georgia (1793) 2 U.S. 419, 456-457 as an essential element of a republican form of government) secured by the Guaranty Clause. Plaintiff made this same point at the June 11 hearing (see Hearing Transcript at 11-12, quoted at 11 Record 32). Thus Plaintiff's Guaranty Clause claim has the independent basis elsewhere in the Constitution which makes it cognizable under the order of July 1, 1982.

But the discussion of Plaintiff's Guaranty Clause claim in the order of April 19, 1983 makes no attempt to defend Judge Karlton's position that the Guaranty Clause is jurisdictionally insubstantial; instead the Court argues,

> "Even commentators calling for sweeping judicial intervention in state affairs on the basis of the Guaranty Clause, however, concede that the law does not presently permit the adjudication of 'claims that the structure of public decisionmaking should be altered to conform it to some concept of

> republicanism.' Note, A Niche for the Guarantee Clause, 94 Harv. L. Rev. 681, 687 (1981). It is just such claims that the Plaintiff seeks to litigate in this case." (8 Record 121.)

This line of attack on Plaintiff's Guaranty Clause claim misses the mark, since there is nothing at all in Plaintiff's briefing or elsewhere which supports such a characterization of Plaintiff's Guarantee Clause claim; and indeed the order does not supply any specifics to justify its characterization.

In supplemental briefing called for by the order of April 19, 1983 Plaintiff points out that the Court's interpretation of Plaintiff's Guaranty Clause claim is the reverse of what Plaintiff in fact alleges to be a violation of the Guaranty Clause:

> "Plaintiff, along with the minority of the California Supreme Court, has alleged that the majority in Assembly v. Deukmejian has restructured public decision-making in California by abrogating refer-

endum stay provisions. See 3 Record 177. In his dissenting opinion (30 Cal.3d at 681-682) Justice Richardson [supported by Justices Mosk and Kaus] notes:

> 'The majority finds it anomalous that a "mere" 5 percent of the voters can effectively postpone the Legislature's reapportionment plan. The answer, of course, is that this was the people's own decision to fix the qualification at 5 percent. In actuality the signatures were in excess of 12 percent and these were speedily obtained. . . . The majority's quarrel on this score is more appropriately directed to the framers of the State Constitution and to the people themselves who, in adopting the provision, authored the dual protections of gubernatorial veto and referendum stay as safeguards against legislative abuses.' 3 Record 177-178." (8 Record 297-298.)

The Court simply ignored the supplemental briefing filed pursuant to its order of April 19, 1983. Plaintiff in his December 6, 1983 plea for expedited consideration (at 10 Record 329) and again in his March 13, 1984 Memorandum Regarding Procedural Problems (at 12

Record 81) again tried in vain to focus the Court's attention on his actual Guaranty Clause claim.

9. Subsequent Consideration of Partisan Gerrymandering Aspects of Plaintiff's Claims

In his summary of major claims which was submitted prior to the October 27, 1982 hearing to demonstrate "probable success on the merits" Plaintiff clearly differentiated his partisan gerrymandering claim from the commonly asserted notion that political minorities have a right to proportional representation. Plaintiff's "Appendix on Partisan Gerrymandering in California" (5 Record 284-296) provided extensive documentation to show that (1) the natural clustering of voters in California tends to waste Democratic voting strength because much of this strength is concentrated in lopsidedly Democratic neighborhoods, (2)

Democratic candidates were favored by artificially creating lopsided Republican districts by grossly distended and convoluted district configurations in the congressional, senate and assembly plans, and (3) even if Republican candidates won a majority of the aggregate vote, all three sets of districts were so biased in favor of Democratic candidates that Democrats would win a majority of seats. These basic characteristics of the challenged redistricting plans are readily apparent from the maps and voting statistics published by the Secretary of State, and no one has attempted to dispute Plaintiff's statistical evidence documenting them.

Nevertheless, the order of April 19, 1983 ignores the actual nature of Plaintiff's partisan gerrymandering claims and thus rejects them because even though

"There is certainly something to be

> said for the notion that the Equal Protection Clause protects members of minority political groups from intentional discrimination in the reapportionment process . . . . There is not, however, any fundamental right to proportional representation based on political affiliation." (8 Record 121, 123.)

The order of April 19, 1983 (at 8 Record 118) put off a ruling on Plaintiff's senate claim, where partisan gerrymandering involved systematically underpopulated Democratic districts and overpopulated Republican districts, even though such a grievance was recognized as cognizable by the order of July 1, 1982. Adjudication of this claim had been previously postponed by the Court on May 4, 1982 (3 Record 43), August 31, 1982 (5 Record 111), October 19, 1982 (5 Record 186), November 1, 1982 (5 Record 482), and December 17, 1982 (7 Record 525).

In his January 15, 1984 plea to the District Court for a status conference

to expedite a decision on motions which had then been under advisement for nearly a year, Plaintiff (at 11 Record 132-133) quotes another observation of the order of April 19, 1983:

> "The fact remains, as the Plaintiff candidly concedes, that no federal court has ever held a reapportionment plan unconstitutional on the basis of partisan gerrymandering. [Citation.]" (8 Record 122.)

Plaintiff then comments,

> "Even if this were still true, a litigant does not need a precedent squarely supporting his position to avoid dismissal of a claim at the pleading stage. However, in Farnum v. Burns II (1983) 561 F.Supp. 83 a federal court struck down a state legislative redistricting plan solely on the grounds of partisan gerrymandering. See 8 Record 459-468. This precedent is especially applicable to Hallwell v. Eu since the federal court acted in its exercise of pendent jurisdiction over an anti-gerrymandering provision of the Rhode Island Constitution which is similar to California's Article XXI."

Plaintiff's January 15, 1984 status conference request was denied. The order

of February 6, 1984 explains,

> "The undersigned judges currently have under advisement [Plaintiff's motion for senatorial injunctive relief and the Senate's dismissal motion]. In light of these pending motions, it would be ill-advised to hold a status conference at this time." (12 Record 46-47.)

When the Court ended its year-long "most careful and thorough consideration" of Plaintiff's motions on March 27, 1984 it ruled:

> "Plaintiff's allegation that [systematically overpopulating Republican districts] discriminates against Republicans avails him nothing. There is no authority for the proposition that a reapportionment plan that discriminates on the basis of political party offends the Equal Protection Clause. Dicta to the contrary notwithstanding, the United States Supreme Court has never invalidated an apportionment plan that reflected the majoritarian party's exercise of its superior power." (12 Record 238-239.)

The Court thus ignores the fact that the locus of "superior power" which imposed the contested districts was the Democrat-controlled California Supreme Court,

which adopted these contested districts by abrogating the referendum stay provisions of the State Constitution. This certainly was not a case of a majority exercising its political power except within the State Supreme Court, since the contested districts were rejected by 62% of the California electorate -- yet were used in the General Election following their rejection by the voters.

The pattern of the Court's refusal to discuss any of the claims actually presented by Plaintiff will become clearer in the next section, which deals with the purely one-person-one-vote aspects of Plaintiff's challenges to the senate, assembly, congressional, and board of equalization districts, since these are issues which the Court had unequivocally affirmed its willingness to address.

C. Denial of Injunctive Relief by Delay

1. Disposition of Senate Claims

In his Notice of Appeal at 17 Record 302-305 Plaintiff summarizes the Court's repeated refusal, during the first year of Halliwell v. Eu, to act to remedy senate district misnumbering which had the effect of cancelling elections in some districts and causing election of a second senator from other districts which averaged 8% higher in Democratic percentage of voter registration. After delaying for procedural reasons until December 17, 1982 the Court refused Plaintiff's request for an expedited hearing because "[no] irreparable injury will occur if his application for a preliminary injunction is not heard before the day set for the hearing of all other pending motions, February 16, 1983." See 7 Record 525-526.

At this hearing the following exchange took place:

> "JUDGE KARLTON: May I ask you a question of fact. Assuming that the double representation and disenfranchisement alleged by Mr. Halliwell now exists in the Legislature, is it a fact that that problem will be cured inevitably by the 1984 election?
>
> "MS. FERGUSON [Senate counsel]: Yes, Your Honor.
>
> "JUDGE KARLTON: Thank you, ma'am." February 16, 1983 Hearing Transcript at 42.

Thus the Court ruled thirteen months later in its order of March 27, 1984 that

> "[E]ven if [Plaintiff] were to amend his complaint to allege a cognizable claim, or convince us of the correctness of his vote acceleration and deferral theory, the Court would in the exercise of its equitable power deny him the relief he seeks. New, statewide elections would simply be too drastic a remedy for the hypothetical problem which time alone will very shortly resolve." (12 Record 245.)

The Court had delayed ruling for a year after the February 1983 hearing because the issues required "most careful and thorough consideration by the Court"

(order of April 19, 1983 at 8 Record 118). Yet the order of March 27, 1984 refuses to provide even declaratory relief by ruling on the constitutionality of the numbering of the contested senate districts.

> "In holding that we would not, in any event, grant the relief requested in this case we do not pass upon the question of when, if ever, vote acceleration and deferral can rise to the level of constitutional infirmity. In addition, we express no opinion as to the appropriate relief in circumstances other than those before us." (8 Record 244.)

Plaintiff appealed (C.A. #84-1859) the denial by the order of March 27, 1984 of his motion to remedy the double representation and disenfranchisement of senate districts, but by the time Judge Karlton's clerk had prepared the transcript of the February 16, 1983 hearing on this motion, Plaintiff's proposed special election date of June 5, 1984 had passed and Plaintiff had to submit a

revised remedial proposal to the District Court. See 13 Record 209-271. The order of July 3, 1984 (13 Record 333-334) ordered this motion briefed, but the Senate's opposition (13 Record 413-419) avoided all discussion of the specifics of Plaintiff's proposed remedies (tailored to the flaws of the districts most affected by vote deferral and acceleration). Since Plaintiff's revised proposal focussed on aspects of the problem which time alone would not resolve until 1986 or 1988, the Senate's refusal to address the practical aspects of Plaintiff's revised remedies left the District Court with a choice between deciding the issue to which it had devoted more than a year of "the most careful and thorough consideration" and simply refusing to rule on the motion. The Court followed the latter course for a full year after briefing was completed.

Plaintiff's motion for reconsideration of the dismissal of his underlying senate claim also was ignored for a year after briefing was completed.

Then the Court issued a sua sponte ruling which "dismissed the action in its entirety, without leave to amend." On July 9, 1985 the Court asserted that it had disposed of Plaintiff's senate claims even though it had not even ruled on his long-pending motions. Plaintiff protested this refusal to rule on July 17, but on August 5 the Court -- without even addressing its refusal to rule on Plaintiff's motions -- declared: "The appropriate method for challenging this Court's reasoning is an appeal to an appropriate tribunal." (15 Record 354.) For a more complete account of the disposition of Plaintiff's senate claims see 18 Record 287-306.

2. Disposition of Assembly Claims

The California Supreme Court adopted Chapter 537 (1981 Statutes) as corrected by Chapter 589 § 3 as its own court-ordered plan after this plan had been blocked by valid referendum petitions. See Assembly v. Deukmejian (1982) 30 Cal. 3d 638, 643, 678. These districts were immediately challenged in federal court as being flagrantly unconstitutional. The Secretary of State then -- without any legal authorization whatever -- substituted revised versions for 85% of the challenged assembly districts and used these revised districts to conduct the 1982 elections.

Because the Secretary of State has refused to supply any maps or legal descriptions for these revised districts, which involve at least several hundred departures from the unambiguous language of the statutes blocked by referendum,

it has been unclear what districts were actually used to conduct the 1982 assembly elections. The Assembly has provided an affidavit which claims, without any documentation whatsoever, to list the "actual populations of the districts used in 1982." Since the Assembly has refused to supply any census population data it has been impossible to verify or to refute the Assembly's population claims. See 4 Record 8-9. Plaintiff has maintained that "Total stonewalling cannot be an adequate substitute for demonstration of compliance with federal or state one person, one vote requirements." (4 Record 70.)

Because of the Assembly's refusal to supply essential data and the Court's refusal to address the merits, Plaintiff was unable to secure pre-election adjudication of his Assembly claim. Plaintiff therefore filed a motion to shorten to

one year the terms of legislators elected from unconstitutional redistricting plans (as in Cosner v. Dalton (1981) 522 F. Supp. 350, 364). The Assembly failed to file its opposition to Plaintiff's term-shortening motion as required by the Court's briefing schedule, so consideration of this proposal was postponed. (See order of January 28, 1983 (7 Record 384-385).)

The Assembly thus prevented oral argument on Plaintiff's motion which challenged the Assembly plan. It achieved the same result for its summary judgment motion when it filed it "out of season" after the February 16, 1983 hearing.

On April 19, 1983 the Court finally called for completion of briefing on Plaintiff's motion calling for interim special elections to be held on November 8, 1983. The order of April 19 also took cognizance of the Assembly's summary

judgment motion and deferred a decision on oral argument until briefing was completed on both motions. (See 8 Record 127.)

November 8, 1983 passed into history without the Court's ever ruling on Plaintiff's motion for special elections concurrent with the city general elections held that day.

Plaintiff never was given any opportunity to propose a revised Assembly remedy, because on March 27, 1984 the Court granted the Assembly's motion for summary judgment without a hearing. Apparently forgetting about affidavits from Assembly v. Deukmejian proceedings previously submitted by Plaintiff which showed that the maximum population disparity was larger than 10%, the Court accepted the Assembly's 4% claim. The order of March 27 explains,

"The Plaintiff vigorously dis-

> putes the figures proffered by the Assembly, but not in any legally cognizable way. The United States Court of Appeals for the Ninth Circuit has repeatedly held that a party opposing another's motion for summary judgment must counter the moving party's affidavits or declarations with affidavits or declarations of his own, and failure to do so will result in the granting of the motion." (12 Record 248.)

In support of his motion for reconsideration of the summary judgment granted to the Assembly, Plaintiff provided a second copy of the overlooked affidavit by Dr. T. Anthony Quinn (the chief reapportionment consultant to the Assembly Republicans), with the districts having the largest population disparities marked in red. Plaintiff proved with tract-by-tract population data (see 13 Record 178-200) that even taking into account textually demonstrable errors in district descriptions, there was only a minuscule reduction (from 10.11% to 10.07%) in the population disparity attested to in the

previously submitted affidavit.

The Assembly's only response to Plaintiff's documentary proof was that "Plaintiff's tedious analysis" was "irrelevant", since "entirely different districts are now in place" (see 13 Record 431). Plaintiff replied in rebuttal:

> "At 8 Record 530-537 Plaintiff has demonstrated that the average assembly district is 92% unchanged from the previous district with the same number. Fifty-seven of eighty districts have only trivial changes or no changes at all. In every instance significant modifications have only served to make the districts more secure for the incumbent who was elected in 1982." (See 13 Record 475-476.)

The Court never ruled on Plaintiff's motion for reconsideration. A year after briefing was completed the Court issued its order of August 5, 1985 (15 Record 353-354), refusing to take further action on any aspect of the case.

See 18 Record 164-225 and 267-287

for the specifics of the tactics used to obscure the true characteristics of the contested assembly districts and to abort consideration of this claim.

3. Disposition of Congressional Claims

Unlike the proponents of the Legislature's reapportionment plans for its own districts, proponents of the congressional plan submitted census population data for their plan to the California Supreme Court. However, as Plaintiff's complaint points out,

> "The opinion of the Court in Assembly v. Deukmejian [(1982) 30 Cal.3d 638] is remarkable in that, even though the accuracy of population figures supplied by proponents was vigorously disputed, there is no mention whatever of the populations of the congressional districts which the Court ordered into effect. Article I § 2 of the United States Constitution requires virtual population equality in congressional districts (Kirkpatrick v. Preisler (1969) 394 U.S. 525, and in every other case where a court has ordered its own congressional redistricting plan or selected a plan

> from among those submitted to it the court has felt obliged to discuss compliance with this important federal requirement." Id. at 3:6-16.

Relying on figures from a Rose Institute publication, Redistricting 1981: Proposition 6 Compliance (see Exhibit C-1 at 1 Record 275), Plaintiff listed four congressional districts with deviations from the ideal population that were greater than 3,000 and noted that

> "the total deviation between the largest and smallest of these districts is 1.32%, and this is approximately twice the total deviation which was ruled in violation of federal requirements in Daggett v. Kimmelman (1982) 535 F.Supp. 978 [affirmed sub nom Karcher v. Daggett (1983) 103 S.Ct. 2653]." Id. at 4:2-6.

In its first dismissal motion the Assembly sought dismissal of "all causes of action challenging California Assembly and Congressional districting plans." (3 Record 249.) However, Plaintiff's later demonstration that the "population

deviation of about 0.08%" (13 Record 133-134) claimed for the congressional plan by James R. Tucker (chief legal counsel to the Special Committee on Elections and Reapportionment of the State Assembly) was about twenty times larger than that caused the Assembly to abandon its defense of the congressional plan.

The Assembly tried to sidetrack Plaintiff's congressional claim with a motion alleging,

> "[T]he Plaintiff should be required to serve as defendants each California congressional representative because each has an interest potentially affected by Mr. Halliwell's claim. In the absence of any discernable organization representing the interests of all of California's members of Congress, each of these representatives must be served individually." (7 Record 11.)

The Assembly also urged that Plaintiff be required to accomplish this task in short order: "The Plaintiff should be allowed fifteen (15) days to either

effectuate service or have his claim with respect to congressional districting dismissed." (7 Record 11-12.)

Although Judge Karlton had suggested this motion requiring compulsory joinder of the congressional delegation at the December 6, 1982 status conference, the full Court rejected the Assembly's motion in the order of April 19, 1983.

> "In the final analysis, the Court must acknowledge the apparent fact that no action challenging the apportionment of electoral districts has ever been dismissed on this ground." (8 Record 125.)

The order of April 19 also rejected a motion from the Secretary of State alleging that "she is not the proper party defendant to an action challenging the apportionment of state electoral districts." But the Secretary of State ignored this ruling and refused to respond even to those aspects of Plaintiff's case challenging the legality of her own

actions.

In its order of March 27, 1984 the Court finally ordered briefing on Plaintiff's claim challenging the allocation of population among the congressional districts. Plaintiff therefore updated his proposed remedy (12 Record 465-476) and documented his claim with detailed affidavits (12 Record 477-542) as provided for by the order of March 27. Plaintiff's affidavits included tract-by-tract population listings for the districts with the greatest population disparities, proving that there was a disparity of 7,000 between the largest and smallest district populations.

But the Secretary of State refused to address Plaintiff's documentation or to file any opposition to Plaintiff's motion. Instead, in her rebuttal in support of her own motion to dismiss Plaintiff's claim, where she had the

last word, Defendant said, "it is difficult to perceive on what foundation" Plaintiff's congressional population figures are based, and "Defendant could and would make a complete defense on the merits if it were necessary." (See 13 Record 130.)

When Defendant refused to respond to Plaintiff's congressional motion Plaintiff filed a motion to require completion of briefing on this motion. This motion was ordered briefed by the Court, but then the Court simply ignored the briefing on whether to complete briefing.

Briefing was completed on Defendant's motion seeking dismissal of Plaintiff's congressional claim, but Defendant's grounds for dismissal were simply that the 1982 elections already had been conducted and this fact rendered Plaintiff's challenge moot. This contention already had been rejected by the Court

(see 15 Record 21-22); yet instead of rejecting Defendant's motion, the Court took it under advisement for 13 months after briefing was completed. Then the Court ruled that Plaintiff's claim was indeed moot because "the relief sought has become impossible to grant due to the passage of time." (Order of July 9, 1985, at 15 Record 199.)

The Court justifies its July 9, 1985 ruling of mootness by referring to previous briefing on Plaintiff's congressional claim, but Plaintiff has demonstrated by complete quotations of relevant portions of prior briefing (see 17 Record 133-147) that this is a misrepresentation of the history of the case. Plaintiff's July 17, 1985 motion for reconsideration of the dismissal of his congressional claim (15 Record 228-270) showed that the Court also had misrepresented all of the seven unbriefed cases

which it had invoked to support its finding of mootness. Plaintiff's motion also noted three precedents on which the Court had been briefed but had ignored: American Party of Texas v. White (1974) 415 U.S. 767, 791 n. 23; Democratic Party of the United States v. Wisconsin (1981) 450 U.S. 107, 115 n. 13; and Firefighters Local Union No. 1784 v. Stotts (1984) 104 S.Ct. 2576, 2584. (White, supra precludes mootness because the challenged constitutional flaws were perpetuated in the successor districts; Stotts, supra precludes mootness because of continuing collateral effects (congressional incumbency) which might be rectified by a favorable decision; and Wisconsin, supra precludes mootness because the interim congressional plan presented an issue "capable of repetition, yet evading review.")

The Court did not allow briefing on

this motion for reconsideration. Eastern District of California Local Rules 230 (c) and 230(d) require that the filing of opposition and reply briefs precede the Court's ruling on Plaintiff's motion. Furthermore, since Plaintiff's congressional claim is a challenge to a statewide apportionment plan, 28 U.S.C. § 2284 requires a hearing before the court disposes of this claim. Notwithstanding the Court's notion expressed in its order of August 5, 1985 that "The Court has determined that it may dispose of this motion without the benefit of oral argument" (15 Record 153-154), a hearing must be held -- particularly since the Court has never heard <u>any</u> argument on Plaintiff's congressional claim.

See 18 Record 254-267 for the details of the Court's treatment of Plaintiff's congressional claim.

4. Board of Equalization Claim Ignored

At 16 Record 26 of his September 20, 1985 Docketing Statement Plaintiff points out that

> "There has not been even the barest semblance of an adjudication of Plaintiff's Board of Equalization claim. Consideration of this claim by the Court has yet to commence because the original Defendant supports this claim, and neither of the intervenors has taken a position on it. The California Supreme Court is the state agency whose action gave rise to Plaintiff's Board of Equalization grievance, but the three-judge panel has thus far refused to rule on Plaintiff's motion to cure the defects in his May 17, 1982 joinder of the California Supreme Court as a defendant."

The "Lack of Defenders Against Plaintiff's Board of Equalization Claim" is explained at 17 Record 114-115:

> "Since the California Supreme Court applied a provision of Article XXI of the California Constitution that refers in identical terms to congressional, state senate, assembly and board of equalization districts but applied them in diametrically opposite ways and thereby helped the Democratic Party in each

> case, any defense against Plaintiff's BOE claim would inevitably undercut the claims for the constitutionality of the treatment of the other three sets of districts in Assembly v. Deukmejian.
>
> "Plaintiff has tried in vain to persuade the Court to require someone to defend against his BOE claim. (See 15 Record 361-368.) The order of April 19, 1983 affirmed the obligation of the Secretary of State to "defend the interests of the State" in a redistricting action, and the order of March 27, 1984 required that the Secretary of State provide such a defense against Plaintiff's congressional claim, but the March 27 order did not require any defense against Plaintiff's BOE claim.
>
> "This omission might be explained by the fact that the Secretary of State was the losing party in the action in the California Supreme Court which gave rise to this grievance, and the Secretary of State subsequently admitted that she agreed with Plaintiff's position with respect to the unconstitutionality of the challenged BOE plan. See 1 Record 221, 4 Record 245."

The refusal of the District Court to adjudicate Plaintiff's BOE claim was not an oversight, since the Court also ignored the updated proposals for injunctive relief in Plaintiff's March 20,

1986 BOE plan.

In his December 1, 1986 petition to the Ninth Circuit en banc Plaintiff explains (at 16 Record 318) the Court's final refusal to adjudicate Plaintiff's BOE claims as part of its systematic obstruction of justice:

> "Plaintiff has no reason to believe that a proper adjudication of his Board of Equalization claim was considered much of a threat by the Democratic officials who had tenaciously resisted adjudication of his congressional and state legislative claims. However, the discovery hearing before Magistrate Mix slated for July 25, 1985 posed a critical threat to the ongoing effort to keep the constitutional flaws of these three sets of districts from becoming a matter of record. On July 9, 1985 the District Court acted sua sponte to tetminate the action in its entirety in order to abort the scheduled discovery hearing. The Court avoided even referring to the discovery proceedings; thus it avoided having to give any explanaiton for halting them and thereby abetting the cover-up which discovery proceedings threatened to begin to unravel."

Plaintiff adds at 16 Record 481, in his "Memorandum on the Status of the Case"

of January 22, 1987:

> "If the District Court had undertaken any sort of adjudication of Plaintiff's Board of Equalization claim it would have been unable to shut down discovery proceedings, for its sua sponte ruling had to minimize embarrassing issues by sweeping all specifics of the case under the blanket dismissal."

See 18 Record 306-321 for the details of the Board of Equalization aspect of Halliwell v. Eu.

D. Systematic Evasion of Fundamental Factual and Procedural Issues

1. Joinder of the California Supreme Court

Plaintiff's "Memorandum on the Status of the Case" of January 22, 1987 discusses the California Supreme Court's "Pivotal Role in Adoption of the Contested Districts" at 16 Record 395:

> "In adopting the Legislature's redistricting plans which were blocked by referendum petition and in refusing to require reapportionment of BOE districts which were two years older than the then-existing congressional and state

> legislative districts, the California Supreme Court abrogated numerous state and federal constitutional requirements. The resulting configurations of all four types of districts were biased in favor of Democratic candidates, yet the Democrat-dominated California Supreme Court did not even attempt to justify the glaring constitutional flaws in the districts which it adopted. No mention was made of gross violations of the requirements of Article XXI of the California Constitution by all four plans, and Assembly v. Deukmejian (1982) 30 Cal. 3d 638 was silent on such vital issues as senate district disenfranchisement and double representation, congressional district population disparities, and the Secretary of State's substitution of different versions of most assembly districts. The California Supreme Court rejected BOE redistricting without issuing any opinion at all.
>
> "Thus any defense based on the bare text of the Court's opinions will be inadequate. In order for the federal court to evaluate such a defense, the California Supreme Court must explain the reasoning by which it determined that practical necessity required the adoption of such flagrantly unconstitutional districts. See 12 Record 6-7."

See 18 Record 155-163 for a compilation of issues raised in briefing on the question of joinder of the California Supreme

Court.

When Judge Karlton ruled against Plaintiff's motion to cure procedural defects in his May 17, 1982 joinder of the California Supreme Court his order of April 4, 1985 made no mention at all of the issues raised in briefing. Judge Karlton signed the following perfunctory statement which had been lodged with the Court seven months earlier by Defendant:

> "Good cause appearing therefore, the Court denies the motion to join the Supreme Court. No claim is or can be stated against the Supreme Court with respect to the issues in this case." (14 Record 3.)

The full three-judge panel subsequently refused to take cognizance of Plaintiff's efforts to refer the joinder issue to them pursuant to 28 U.S.C. § 2284(b)(3).

2. Discovery Ruling Sought by Plaintiff

The story of how Defendants and the Court managed to dispose of Plaintiff's

claims without ever allowing him any discovery at all in spite of Plaintiff's clearly relevant formal inquiries to each of the Defendants is summarized at 18 Record 164-253. Although Campbell v. United States (1961) 365 U.S. 85, 96 deals with personal rather than political liberty, Plaintiff has contended that the principle enunciated there should apply fully to resistance to discovery by a state legislature regarding information necessary for a determination of the constitutionality, vel non, of its redistricting plans:

> "In addition to the consideration that the interest of the [government] . . . 'is not that it shall win a case, but that justice shall be done' [citation], the ordinary rule, based on considerations of fairness, does not place the burden upon the litigant of establishing facts peculiarly within the knowledge of his adversary. [Citations.]"

The District Court's order of July 9, 1985 shut down proceedings shortly

before Magistrate Mix's slated hearing on Plaintiff's right to discovery. The order not only brushed aside Plaintiff's fully briefed motion for reconsideration of the order of March 27, 1984, refused to complete briefing on other pending motions, ignored Plaintiff's Board of Equalization claim, and stated (at 15 Record 198) that "the only remaining matter before the Court" was Defendant's motion alleging that Plaintiff's congressional claim was moot, it did not even allude to the fact that Plaintiff's motions to compel discovery were under consideration by a magistrate.

Plaintiff's petition for mandamus (at 16 Record 11-13) seeks to require a ruling by the District Court on his right to compel discovery. Plaintiff contends that in the circumstances the refusal of the District Court to ever even rule on this matter is enough of an abuse of

discretion to entitle Plaintiff to the minimal relief he seeks.

3. Leave to Amend to Challenge the 1983 Districts

Plaintiff at 17 Record 128-133 quotes the prior orders of the Court which suggested that Plaintiff could readily have secured a ruling on his right to challenge the 1983 districts. As Plaintiff demonstrates in that section, the Court avoided addressing this question for some time and then, in the order of June 25, 1985, turned the matter over to Judge Karlton. Judge Karlton heard Plaintiff's motion for leave to amend on August 27, 1984, took the matter under advisement until April 4, 1985, and then ruled,

> "To the degree the Plaintiff seeks to amend or supplement his complaint, the motion is also DENIED, as the amendments or supplementations add nothing to the claims already rejected by the Court in previous motions. (14 Record 3.)

The above statement seems to suggest that some previous order of the Court had addressed the issue of whether Supreme Court decisions since the order of July 1, 1982 supported any of Plaintiff's claims excluded by that order. See, e. g., Schmidt v. Oakland Unified School District (1982) 73 L.Ed.2d 245 and Karcher v. Daggett (1983) 103 S.Ct. 2653. No such order was ever issued by either Judge Karlton or the full court. Judge Karlton's ruling apparently reflect his opinion that these recent decisions do not make any difference with respect to the claims he had excluded.

Judge Karlton's order also seems to imply that the Court had previously ruled on Plaintiff's right to amend his complaint to challenge the 1983 districts. This is not true; indeed, this was the main point of Plaintiff's motion for leave to amend and was recognized as

such in all three of the Defendants' oppositions to this motion. (See 13 Record 503-508, 515-521, and 529-533.) But the order of April 4, 1985 does not refer to this subject; and before Plaintiff could appeal the issue of the 1983 districts to the full Court, the three-judge panel shut down proceedings entirely, saying that Plaintiff was not entitled to any remedy because "[The 1984] election, and the plan under which it was conducted, is not before the Court." (15 Record 200.)

See 18 Record 140-155 for a chronology of Plaintiff's unsuccessful efforts to secure a ruling on his right to include the 1983 districts within the scope of his complaint.

4. Court's Sua Sponte Termination of Proceedings

The order of July 9, 1985 did not simply dismiss the congressional

claim set forth in Plaintiff's complaint which was the subject of the motion noticed by the order of March 27, 1984. The order goes far beyond this in ruling:

> "Defendant Eu's motion argued that Plaintiff's remaining claim was moot, since the 1982 elections have passed.
>
> "For the reasons which appear below, the Court finds that Plaintiff's remaining claim is moot. The action is therefore DISMISSED in its entirety without leave to amend." (15 Record 198.)

Plaintiff's motion for reconsideration protested the Court's sua sponte termination of the action without resolving major aspects of the case which were simply left hanging.

The order of August 5, 1985 flatly rejected any further consideration of any aspect of the case, saying,

> "The appropriate method for challenging this court's reasoning is an appeal to an appropriate tribunal.
>
> "Accordingly, Plaintiff's motion is DENIED without leave to renew it." (15 Record 354.)

One day after Plaintiff received the order of August 5, 1986 Plaintiff filed a motion (15 Record 357-382) which did not renew his challenge to any of the Court's reasoning but simply sought rulings on aspects of the case on which the three-judge panel had never taken any position. Plaintiff concluded this emergency motion,

> "Supreme Court Rule 15.1(j)(i) requires an appellant to attach orders disposing of all aspects of the case which he wishes to appeal; this requirement must not be defeated by the lower court's refusal to issue any orders at all or orders so superficial that they completely evade the issues regarding the very aspects of the case where the court's position is weakest." (15 Record 379. Emphasis in original.)

The District Court ignored Plaintiff's August 9, 1985 motion to secure rulings on aspects of the case left hanging by its sua sponte termination of the action.

IV. RELIEF SOUGHT ON APPEAL

A. Consideration of Appeal by the Ninth Circuit

On August 31, 1985 Plaintiff petitioned the Ninth Circuit for a writ of mandamus to require the District Court to act on matters left hanging by its sua sponte termination of proceedings. (See Notice of Appeal at pp. 102-128 of Appendix B.)

During the 14 months in which the Ninth Circuit considered Plaintiff's petition for mandamus it issued only two orders, neither of which gives any clear indication of that court's grounds for its denial of jurisdiction over Plaintiff's appeal.

On August 19, 1986 Circuit Judges Tang, Brunetti and Kozinski issued the following order:

> "The Supreme Court has exclusive jurisdiction over this appeal. 28 U.S.C. § 1253; MTM, Inc. v.

> Baxley, 420 U.S. 799 (1975); Fusari v. Steinberg, 419 U.S. 379 (1975). Appellees' motions to dismiss the appeal for lack of jurisdiction are denied. The Clerk will transfer the appeal to the Supreme Court of the United States." (16 Record 239.)

On August 26, 1986 Plaintiff filed a motion for reconsideration (see 16 Record 239-258) of the order of August 19, 1985. This motion analyzed every relevant aspect of the authorities cited in the order and demonstrated that none of them supported Supreme Court jurisdiction at this stage of proceedings. Reconsideration was denied by the same panel in its order of November 5, 1986:

> "Appellant's petition for reconsideration of the order transferring this appeal to the Supreme Court of the United States is denied." (16 Record 259.)

On December 1, 1986 Plaintiff filed a motion for clarification and stay of jurisdictional transfer (16 Record 260-271) and a notice of appeal (see pp. 88-101 of Appendix B) with the Ninth Cir-

cuit. On February 26 the Ninth Circuit responded to Plaintiff's motion for stay and clarification with an order which states in its entirety,

> "Appellant's motion for clarification of our prior orders in this case is denied, as is his request for a stay of the transfer of his appeal to the Supreme Court. Appelland fails to comprehend that the jurisdiction of the Supreme Court under 28 U.S.C. § 1253 depends not on the nature of the issues he may seek to raise, but on the nature of the order entered by the district court. We will not entertain any further requests for reconsideration, clarification, or the like.
>
> "Appellant, we note, has also sought an en banc hearing, expressly disavowing any desire for a rehearing en banc. His request is factually impossible and is denied on that ground.
>
> "The Clerk will forthwith effectuate our order of August 19, 198(, by transferring this appeal to the Supreme Court of the United States. No further submissions from appellant will be received in this cause. The Clerk shall return to appellant any proffered filings." (17 Record 157-158.)

For details of Plaintiff's attempted appeal to the Ninth Circuit see 18 Record 322-360.

B. Further Proceedings on Jurisdictional Transfer

On March 27, 1987 Plaintiff noticed this appeal from the order of February 26, 1987. (See pp. 1-87 of Appendix B.)

Plaintiff argues in the Foreword of his March 27, 1987 Notice of Appeal:

> "The obscurity of the orders which purport to transfer jurisdiction over Plaintiff's appeal to the Supreme Court is a device whereby those anxious to avoid scrutiny of the procedural misconduct in this case hope to proceed directly to the trial court's substantive rulings without first allowing Plaintiff any opportunity to gain enforcement of his procedural rights and thereby develop a minimally adequate factual record on which to base an appeal on the merits. But Federal Rule of Appellate Procedure 21(b) flatly precludes any such effort to 'get around' procedural issues and proceed directly to the underlying merits on the basis of a deliberately misleading record compiled by a district court which has engaged in a systematic obstruction of justice from the inception of the case." (17 Record 249-250.)

After documenting this contention Plaintiff's Notice of Appeal concludes,

> "The orders of November 5, 1986 and February 26, 1987 are demonstrably only the tip of an iceberg which consists of a fierce determination by several judges of the Ninth Circuit to sweep under the carpet what has transpired in five years of Halliwell v. Eu. There certainly ought to be some forum in which Plaintiff's extensive and thoroughly indexed documentation of judicial misconduct described above can be given thoughtful evaluation, and such an evaluation should commence very soon so that informed decisions can be made regarding the proper course of future proceedings in this case in time to prevent a fourth set of elections from getting underway using the contested districts without any adjudication of their constitutionality." (17 Record 324.)

Because of the evasiveness of both the District Court and the Ninth Circuit panels who have handled Halliwell v. Eu, the development of the fundamental facts of the case is an essential preliminary to any substantive appeal.

Faced with a deliberate sabotage of a litigant's rights by the courts below, the U.S. Supreme Court in N.A.A.C.P. v. Alabama ex rel Flowers (1964) 377 U.S.

288, 302 declined to follow its usual policy of remanding the case for future proceedings and dealt with unresolved factual issues itself. In the present circumstances the best way to cut the Gordian knot into which Halliwell v. Eu has been tied during the past five years may be to appoint a Special Master with broad investigative powers such as has been used in original jurisdiction cases (e.g., Illinois v. Kentucky (1987) 94 L.Ed. 2d 515). Therefore Plaintiff hereby moves that such a master be appointed and charged with the task of collecting information necessary for a decision on the merits and/or recommending what other procedure may be best suited to the circumstances of the case.

Respectfully submitted,

Michael J. Halliwel
Plaintiff-Appellant in Propria Persona

Dated May 26, 1987

PROOF OF SERVICE BY MAIL

I, Betty Halliwell, am a citizen of the United States and am self employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My home address is that of 2930 Colorado Avenue #D-18, Santa Monica, California.

On May 26, 1987 I served the accompanying Jurisdictional Statement via first-class mail with postage fully prepaid at Los Angeles, California on the attorneys of record for defendants Secretary of State, Attorney General, Assembly, and Senate of California and the members of the three-judge District Court:

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The Hon. Lawrence K. Karlton
Chief Judge, Eastern Calif. District
U.S. District Court
650 Capitol Mall
Sacramento, CA 95814

The Hon. Raul A. Ramirez
District Judge, Eastern Calif. District
U.S. District Court
650 Capitol Mall
Sacramento, CA 95814

The Hon. Anthony M. Kennedy
Circuit Judge
Ninth Circuit Court of Appeals
555 Capitol Mall, Suite 1400
Sacramento, CA 95814

Executed on May 26, 1987 at Santa Monica, California. I declare under penalty of perjury, pursuant to California law, that the above is true and correct.

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Betty Halliwell, Ph.D.
(Signature)